

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AUBREY T. H. MOORE, III,

Petitioner

v.

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CIVIL ACTION NO. 1:05CV45
CRIMINAL NO. 1:01CR7
(Judge Keeley)

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On January 31, 2005, pursuant to 28 U.S.C. § 2255, pro se petitioner, Aubrey T. H. Moore, III ("Moore"), filed a petition to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. By standing Order, the Court referred this matter to United States Magistrate Judge John S. Kaull for initial screening and a report and recommendation in accordance with Local Rule of Prisoner Litigation 83.09.

Upon initial review, and pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Magistrate Judge Kaull found that Moore's petition appeared to be untimely filed. Pursuant to Hill v. Braxton, 277 F.3d 701, 707 (4th Cir. 2002), when a federal habeas court believes that a pro se § 2255 motion is untimely and the government has not filed a motion to dismiss based on the one-year limitations period, the court must warn the petitioner that the case is subject to dismissal pursuant to § 2255 absent a sufficient explanation. Accordingly, On July 11, 2005,

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the Magistrate Judge entered an order directing Moore to provide the Court with evidence that his petition was timely filed within thirty (30) days or his petition would be dismissed with prejudice.

On August 18, 2005, the mail containing the Magistrate Judge's July 11, 2005 order was returned as undeliverable. Also, on August 18, 2005, Moore filed a notice of change of address with the Clerk of the Court and the Clerk sent the July 11, 2005 order to the petitioner at his new address. To insure that Moore had adequate time to respond to the July 11, 2005 order, the Magistrate Judge deferred making a recommended finding on the timeliness of Moore's petition until approximately six (6) months had passed from the time the July 11, 2005 order was sent to Moore's new address. Nevertheless, Moore failed to respond to that order, and on March 13, 2006, Magistrate Judge Kaull entered a Report and Recommendation recommending that Moore's § 2255 petition be dismissed with prejudice as untimely.

On March 27, 2006, Moore filed his "Objections to R and R from Magistrate Judge Kaull." In his objections, Moore requests that he be permitted to proceed in forma pauperis on his Motion to Reestablish His § 2255 Motion to Vacate, Set Aside or Correct Sentence. Nowhere, however, does Moore offer any evidence or cite any case law in an effort to refute the Magistrate Judge's recommendation that his petition was untimely filed.

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Accordingly, the Court **ADOPTS** Magistrate Judge Kaul's Report and Recommendation in its entirety and **DENIES** and **DISMISSES WITH PREJUDICE** Moore's 28 U.S.C. § 2255 petition (Doc. No. 41 in 1:01CR7 and Doc. No. 1 in 1:05CV45).

The Clerk is directed to mail a copy of this Order to the pro se petitioner, certified mail, return receipt requested and transmit this Order to counsel of record.

Dated: November 3, 2006.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE